Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	
Communications Policy Act of 1984 as amended	)	**MB Docket No. 05-311**
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

DECLARATION OF TERRENCE P. MCGARTY

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DECLARATION OF TERRENCE P. MCGARTY

I, Terrence P. McGarty, do hereby declare, under penalty of perjury, that the following is true and correct to the best of my knowledge:

1. My name is Terrence P. McGarty. I have over forty years of experience in the telecommunications, cable, and satellite industries in the United States and numerous foreign countries. I hold three degrees from the Massachusetts Institute of Technology (MIT), including a Ph.D. in Electrical Engineering. My business address is 24 Woodbine Road, Florham Park, New Jersey, 07932.

2. I am currently a Research Associate at MIT in the Laboratory for Information and Decision Sciences in the Department of Electrical Engineering and Computer Science. In this capacity, I conduct and supervise research in wireless communications services.

3. I am also a Managing Partner of The Telmarc Group, LLC (Telmarc). Telmarc was founded in 1984 and is an investment and technology development and advisory company. Telmarc has been directly involved in the development of over three dozen companies over the past twenty two years and has raised several hundred million dollars in the process. It has recently focused on the development of Fiber-to-the-Home communications systems and

services, wireless grid systems and services. Telmarc is currently financing and supporting wireless mesh companies assessing how best to combine fiber and wireless for broadband coverage. Telmarc has worked with existing companies in the development of new services in telecommunications and in assessing strategic decisions to enter new business and service opportunities. Telmarc has continued it presence in Central Europe with a presence in Warsaw, Poland and has been working in the Ukraine and Russia.

4. In addition to my duties with MIT and Telmarc, I was the Managing Partner of The Merton Group, LLC (Merton), an independent fiber-based broadband operator in New Hampshire, Vermont, and Massachusetts.

5. I have also served as Vice Chairman of the National Academy of Sciences Board on the Internet and am a member of the Advisory Board of the MIT Internet Telephony Consortium, where I actively participated in research and strategic directions.

6. I have also served on the boards of directors of several companies, including Zephyr Communications and MDSI Mobile Data Systems, Inc., a publicly traded company.

7. In 1996, I founded (and until 2002 was CEO of) Zephyr Communications, an international broadband and IP services company that has one of the largest fiber networks in Central Europe and one of the first companies in the world to build and operate a VOIP telecommunications network.

8. From 1990 until 1992, I was a Senior Vice President at NYNEX and in charge of operations for the NYNEX Mobile Communications Company.

9. From 1986 until 1990, I served as Corporate Director of Research and Development of NYNEX Corporation and was the Managing Director of NYNEX Technology Investment, a venture capital fund.

10. From 1980 to 1984, I served as Vice President at Warner Cable, (subsequently Warner Amex, one of the largest multiple system operators (MSOs) at the time and a predecessor of Time Warner) and as Group President of Warner Communications. During that period, I was involved in the company's efforts to obtain local franchises for such cities as Pittsburgh, Boston, Phoenix, Houston, Dallas, Cincinnati, New York, and Sacramento.

11. From 1976 to 1980, I served as General Manager of COMSAT's first non-regulated satellite communications business where I designed, constructed and deployed the first VSAT networks for Government and commercial customers.

12. This declaration describes the problems Merton encountered in the local cable franchising process in several municipalities in New England while attempting to deploy state-of-the-art Fiber-to-the-Home broadband facilities. In this venture, Merton received a loan commitment for almost $4 million from the US Department of Agriculture Rural Utility Service (RUS) to finance a Fiber-to-the-Home Network in Hanover, NH. In the summer of 2004, Merton, building on its experience in Hanover, also submitted loan requests for ten additional towns. As explained in more detail below, and in *Attachment 1*, the local franchising process became so onerous and time-consuming in these towns that it thwarted our attempts to deploy broadband facilities, rendering RUS financial support unusable.

13. Merton's attempts to obtain franchising agreements for the broadband network in New England communities demonstrate that the local franchising process serves as a

direct and significant barrier to entry for any new entrant seeking to deploy facilities through the public rights-of-way.

14. Deployment of advanced services in the United States is drastically behind the progress achieved in other countries and will continue to lag behind unless barriers to entry, such as the current franchising process, are eliminated. The franchising process requires a substantial overhaul if the mandate of Section 706 of the Telecommunications Act of 1996 (the "1996 Act") to bring advanced services to all Americans is to be fulfilled.

DELAYING MARKET ENTRY: THE EFFECT OF THE LOCAL FRANCHISING PROCESS

15. From my recent experiences with the Merton broadband project, it takes approximately 3 years from the initial planning of a local broadband network to the commencement of service delivery to residences and businesses. A major reason for this lengthy timeframe is the time expended to obtain a video franchise agreement from local franchising authorities (LFAs).

16. To commence the process, a company must perform a project feasibility study, including a detailed business and marketing plan, a network plan with technical specifications, and a system installation plan. The feasibility study must, in general, demonstrate that deployment of a broadband network in a particular community is both technically and economically feasible. These studies take at least 6 months to conduct and complete. Merton completed almost thirty of these studies during the period from June, 2002 through June, 2005. Based upon our experience, about half of the towns studied had the potential to generate sufficient financial returns.

17. If deployment is potentially feasible, the next step is to approach the LFA. This is a highly resource-intensive, time consuming and costly process, involving dedicated and experienced personnel from Merton and often local advisors to help navigate the process.

Discussions, concessions and negotiations take many months and even years to complete before the agreement finally goes before the official governing body for approval. This lengthy timeframe is the direct result of the fact that the local franchising process has become an unmanageable mix of rights-of-way management and local economic regulation.

18. Contacts with most communities begin with discussions with a cable office or franchising board or some other community quasi-governmental body generally responsible for reviewing the initial proposal and making recommendations on how the community should pursue the new agreement. Initial discussions often encompass general "get to know" the company discussions and introduction of key individuals and the participants in the process. Depending on the local franchising law and practice, the applicant may next need to make a presentation to the community demonstrating its intent to proceed, and it may even need to obtain a favorable vote by an oversight board to start the negotiation process.

19. LFAs often have assigned individuals responsible for negotiating the agreement. The manager, or assistant manager, LFA counsel (either LFA employed, outside or both), a representative from the engineering department and other individuals the LFA requires. In addition, a member of the oversight board is usually included.

20. Merton's experience is that LFA negotiators do not want to use the incumbent's cable operator's existing franchise as a starting point for negotiations. Even where the LFA is willing to have the incumbent's agreement serve as a starting point, the LFA frequently imposes additional requirements based on the purported "uniqueness" of the new entrant's proposed network and services.

21. After initial discussions, the applicant offers its first redline mark-up of the franchise agreement. Proposals and counterproposals are exchanged, and additional face-to-face meetings are held when necessary.

22. In addition to the presence of government and community representatives at negotiations and meetings, the incumbent cable operator often attends. I also have found that the LFA and incumbents were often in frequent contact discussing our negotiations.

23. Because discussions can last such a long time, it is not uncommon for the original LFA franchising team to change in the course of discussions. Serious delay occurs as new members must be brought up to speed. Furthermore, most LFAs do not have the resources to immediately review proposals. Members of the franchising team often have additional duties within the community. Proposals may sit in "review" for weeks before someone actually reviews it.

24. Once the negotiators reach agreement, it goes before the LFA governing body for approval. Here, additional changes may be required before the LFA will approve the agreement.

25. After negotiations have been completed and the franchise agreement approved, additional agreements are still required before rights-of-way are actually accessed and facilities installed. Merton actually found that it had to enter into both a franchise and a pole attachment agreement, for example. From my experience, if the municipality owns the poles on which the facilities are to be installed, negotiations for the pole attachment rights can take anywhere from 3 to as long as 18 months.

26. Discussions with other entities such as the telephone company or the power company for pole make-ready can also be time-consuming. These discussions must be

held only after the franchise agreement has been concluded since the standing of an applicant to have attachment rights as a cable operator prior to LFA approval rights is not universally recognized as a practical matter and, as a legal matter, is not a settled issue..

27. Once all necessary agreements are in place, construction can begin. The length of time required for construction varies greatly, depending on such factors as the scale of the project and whether a third party vendor is involved. It is only when construction approaches conclusion that marketing of service is possible, often three years or more after the process began.

28. In an industry as dynamic as the communications market, it is unreasonable for a broadband network project to take three years or longer to complete. I have deployed broadband networks in 23 countries and in no instance in any other country does it take anywhere near this amount of time. By slowing new entry, consumer prices are kept above competitive levels and service innovation is delayed.

29. In addition, because of the time required to obtain a franchise agreement, the new entrant often finds that the technologies and systems originally contemplated (and submitted to the franchising authority as a requirement of the process) have become less than optimal, if not completely obsolete by the time initial service delivery can occur. With technologies evolving so rapidly and with other "non-cable" competitors being able to deploy them promptly, local wireline broadband networks are at a disadvantage. Changes to the franchising process are required to remedy this problem and ensure the United States does not lag behind in broadband deployment.

THE HANOVER EXPERIENCE: WHY THE FRANCHISING PROCESS HARMS DEPLOYMENT OF ADVANCED BROADBAND NETWORKS AND SERVICES

30. In May 2002, I was approached by Beth Ahern, the then Assistant Town Manager of Westwood, Massachusetts, who described her dissatisfaction with the incumbent cable company for the Town. At the time, several communities were beginning to consider the concept of either developing themselves or supporting the development by private sector entities of alternative Local Broadband Networks (LBN). From my discussions with the Ms. Ahern, it appeared that deploying a broadband network would alleviate many of the complaints about the incumbent cable company.

31. After this discussion, my company, Merton, decided to perform initial feasibility studies to determine whether LBNs would be successful. We examined potential deployments in communities throughout Pennsylvania, California, Massachusetts, New Hampshire, Rhode Island, Vermont and Maine. Each feasibility study included marketing studies, engineering studies, and a business plan for the deployment of a LBN.

32. The feasibility studies indicated that the deployment of a LBN in select communities was both technically and economically feasible. With this information, Merton contacted these communities to pursue options for financing such a large scale broadband network deployment.

33. In November 2002, Merton first approached the Town of Hanover, New Hampshire with the a plan to construct a LBN providing advanced services throughout the Town. The Town expressed an interest, and on January 29, 2003, Merton and the Town executed a Letter of Intent to pursue the LBN and the required franchise agreement. As part of the process, the Town requested that Merton perform a more complete study as to the economic and technical feasibility of such a project.

34. In May, 2003, Merton completed its Market Research Report on the status of broadband use, demand, and current offerings within the Town. In July, 2003, Merton completed its engineering study for the LBN in Hanover. The engineering study provided an overview of the planned network in Hanover.

35. Merton then met with representatives from the RUS about obtaining funding from the RUS broadband loan program for the Hanover LBN. The application demonstrated the feasibility of such a deployment. Funding, contingent upon third party equity plus any and all government approvals was confirmed by the RUS to Merton in December, 2003.

36. Also in December, 2003, the Town represented to Merton that it expected the franchise agreement would be completed shortly.

37. Despite this representation and being prepared to construct the network rapidly, Merton found that the process continued to drag on without conclusion. The delays involved debates on two main topics: "parity" requirements and changes to the scale and location of the network.

38. The most significant problem faced by Merton involved the New Hampshire Level Playing Field (LPF) law. The Town's outside counsel interpreted the LPF law to ensure a level playing field only for the incumbent cable operator. In other words, the Town could not grant Merton a franchise more favorable than the incumbent, but it could require a more onerous agreement. For example, under its franchise agreement, Adelphia, the incumbent was required to provide service to fewer than half the road miles required of Merton. Thus, Merton was shackled with the obligations of the incumbent plus additional requirements.

39. In regard to changes to the network, the Marketing Research Report, engineering study, and business plan were based on a fiber plant of approximately 63 street miles

of service coverage. Throughout 2004, however, Town representatives kept making changes to the scale and location of this plant. It took until October, 2004 for Merton and the Town to reach what we thought was final agreement on the network.

40. However, in December, 2004, when we were reviewing the final agreement prior to execution, Merton determined that the Town's new requirements to add additional termination locations and install a 96-strand optical fiber to a public safety antenna would be cost prohibitive. While the Town executed the franchise agreement with these additional obligations, Merton did not sign and sought to continue negotiations.

41. For the next three months, Merton's engineers continued to conduct detailed street surveys and engineering and developed detailed strand maps and databases and facility installation maps and databases for the broadband network in Hanover. At the same time, we submitted multiple requests for a copy of the finalized franchise agreement between Hanover and Adelphia, which was finalized by the Town on December 22, 2004.

42. After three months of such requests, in March, 2005, we obtained a copy of the incumbent's agreement. We found that the requirements imposed by the Town on Adelphia were substantially less burdensome that the requirements imposed in the agreement the Town wanted Merton to sign. By way of example, under the terms of the proposed Merton franchise agreement, Merton was required to build out its network with 98 street miles of coverage, in contrast to the 46 street miles of coverage required for Adelphia.

43. For the next three months (from April, 2005 to June, 2005), using this new information about the Adelphia agreement, Merton exchanged correspondence and continued to negotiate with the Town, but to no avail. In June, 2005, Merton withdrew its request for a franchise agreement with Hanover.

44. Since the withdrawal, there has been an exchange of letters between the Town and Merton where each accuses the other of being the cause of the problems. It is important from a policy standpoint to focus not on these exchanges but rather on the facts related to the process. First, the Town adopted an interpretation of the "parity" law whereby requirements not placed on the incumbent were placed on the new entrant. Second, the length of the process was inordinately long because it required extensive and frequent discussions and negotiations with government officials, their outside counsel, and the entire community.

45. These problems just described are common practices associated with obtaining a franchise agreement from a LFA. For example, Merton faced similar obstacles in the Towns of Jaffrey and Peterborough to those it faced with Hanover, such as being required to produce, and later modify, feasibility studies. In addition, as both communities were aware of the on-going franchise negotiations between Merton and Hanover, both communities were loath to start any meaningful discussions until they knew what Merton had agreed to with Hanover. It became apparent that productive negotiations were not going to occur until the agreement was complete with Hanover. In Peterborough, for instance, the LFA demanded 100% road coverage even though there were miles of road with no residences or commercial buildings. It was only after Merton terminated discussions with Hanover that meaningful discussion ensued with the Towns of Jaffrey and Peterborough.

LESSONS LEARNED: FRANCHISING PROCESS FRUSTRATES BROADBAND DEPLOYMENT

46. In a competitive era, the current cable franchising process is an anachronism. It forces new entrants that are seeking to build competitive advanced broadband networks to enter into a lengthy process with government agencies and community representatives and then comply with terms meant for monopolies, where the cable operator and

the municipality seek some equitable split of the monopoly rents. As a result, new wireline broadband networks are either delayed or not being built. Providers of non-wireline video networks do not face this burden.

47. Merton's experience in Hanover is not unique: the local franchising process, although it continues to be widely employed, is an anachronism in a competitive era. Let me catalogue some of the problems.

48. The cable franchising process is designed to facilitate negotiations between the LFA and a monopoly cable provider. As a result, time is not of the essence. In contrast, for new entrants, the time it takes to commence operation and begin providing services is a critical calculation in any business plan.

49. Second, the current franchising process is a negotiation on how the LFA and monopoly cable operator are to share the monopoly rents. Thus, LFAs seek to obtain from the *new* operator various facilities and services that cannot be offered in a competitive market.

50. Third, the LPF laws and equivalent contract provisions, by making new entry uneconomic, protect the incumbent cable provider and preserve the process of sharing monopoly rents.

51. Fourth, the requirement that a new entrant buildout the entire franchise area is bad economically for new entrants. The initial entrant was able to achieve almost universal penetration of the market, making deployments to less dense areas economically viable. The same does not hold true for new entrants who may often penetrate only a quarter of the market.

52. Fifth, the franchising process does not prohibit the LFA from dictating the type of technology used or the technological specifications for the broadband network. This is

quite problematic in a competitive market, especially considering the fact that technology changes quickly.

53. The LFA should have the authority to set standards for construction within the public rights-of-way. The franchise process, if it is to remain, must be streamlined to become only a rights-of-way management process whereby the authority of the LFA is limited only to the time, place and manner of system installation into the public rights-of-way.

NEXT STEPS: ENCOURAGING NEW ENTRY AND BROADBAND DEPLOYMENT

54. The U.S. government has a policy of promoting broadband deployment, and it should do so on a technology-neutral basis. The local franchising process cannot be allowed to skew the playing field.

55. The government oversight process by which a network is deployed should not result in a drastic difference in the costs associated with entry. As such, the current cable franchising process is a real deterrent to the deployment of broadband networks. Eliminating that process at the local level, if not all together, will encourage the deployment of additional broadband networks in the United States. If the process is not removed from the purview of the LFA, deployment will continue to be hindered.

56. Finally, because technology is changing so rapidly, it is imperative that whatever franchising policies are made, these neither deter technological innovation nor create a situation where the process defines and delimits technological change.

This concludes my declaration.

Terrence P. McGarty

Dated: 5 February, 2006

Attachments

1. McGarty, Terrence P. *The Hidden Costs of Broadband: Franchises, Internet Access, Litigation and Industry Change*, The Telmarc Group, LLC (2005).

ATTACHMENT 1